IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 5TH DECEMBER 2006 / 14TH AGRAHAYANA 1928

WP(C).No. 26573 of 2006(L)

OS.426/2004 of ADDL.MUNSIFF COURT,CHERTHALA

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PETITIONER:

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1. SHAJI, S/O.KARUNAKARAN,
   MAROTTICKAL, THEVARVATTOM MURI,
   THYCATTUSSERY VILLAGE.

2. SMITHA, W/O.SHAJI, MAROTTICKAL,
   THEVARVATTOM MURI, THYCATTUSSERY VILLAGE.

BY ADV. SRI.M.V.BOSE
SRI.VINOD MADHAVAN
SMT.NISHA BOSE

RESPONDENTS:

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1. SIDHARTHAN, S/O.MADHAVAN,
   NIKARTHIL FROM MADATHIPARAMBIL,
   CHENNAMPALLIPPURAM MURI,
   PALLIPPURAM VILLAGE.

2. SUGUNAN, S/O.MADHAVAN, NIKARTHIL FROM
   MADATHIPARAMBIL, CHENNAMPALLIPPURAM MURI,
   PALLIPPURAM VILLAGE.

3. THANKAMANI, D/O.PONNAMMA,
   NIKARTHIL FROM MADATHIPARAMBIL,
   CHENNAMPALLIPPURAM MURI, PALLIPPURAM VILLAGE.

BY ADV. SRI.JOBY CYRIAC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 05/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C)26573/06

APPENDIX

PETITIONERS EXHIBITS

EXT.P1: TRUE COPY OF ORDER DATED 30.6.06 IN C.M.A.18/04 OF THE SUBORDINATE JUDGE, CHERTHALA.

EXT.P2: TRUE COPY OF JUDGMENT DATED 23.12.2005 IN W.P.(C)35764/O5.

EXT.P3: TRUE COPY OF JUDGMENT IN W.P.(C)21032/06

EXT.P4: TRUE COPY OF CAVEAL (O.p.)643/06.

EXT.P5: TRUE COPY OF JUDGMENT DATED 2.8.06 IN W.P.(C)20386/06

EXT.P6: TRUE COPY OF APPLICATION DATED 15.9.06,-I.A.2673/06 IN O.S.426/04 BEFORE THE CHERTHALA MUNSIFF COURT.

EXT.P7: TRUE COPY OF ORDER IN I.A.2673/06 IN O.S.426/04 OF ADDL. MUNSIFF COURT CHERTHALA.

RESPONDENTS EXHIBITS

EXT.R1(A): TRUE COPY OF THE COMMISSION REPORT DT,14.7.04 IN O.S.426/04.

EXT.R1(B): TRUE COPY OF THE COMMISSION REPORT DT. 23.8.06 IN O.S.426/04.

EXT.R1(C): TRUE COPY OF THE ORDER DATED 2.9.04 IN I.A.1869/04

/TRUE COPY/

PA TO JUDGE.

M.SASIDHARAN NAMBIAR,J.

W.P.(C)NO.26573 OF 2006

DATED THIS THE 5th DAY OF DECEMBER, 2006

JUDGMENT

petitioners are the plaintiffs in O.S.426/04 on the file of Addl. Munsiff Court, Cherthala. They filed Ext.P6 application for appointment of a Commissioner. Under Ext.P7 order, learned Munsiff dismissed the application. It is challenged in this petition filed under Article 227 of Constitution of India.

2. Learned Counsel appearing for petitioners and respondents were heard.

3. Arguments of learned Counsel appearing for petitioners was that for the effective decree to be passed in the suit, report of a commissioner is absolutely necessary and therefore Court below should have appointed a Commissioner as sought for and Ext.P7 order is to be quashed.

4. Learned Counsel appearing for respondents submitted that the trail Court has considered the

question whether report of the Commissioner is necessary and application was dismissed finding that for a just decision of the case the report is not necessary. It was also contended that as the reports filed by the Commissioner are available, a new Commissioner is not to be appointed and in such circumstances, there is no reason to interfere with Ext.P7 order.

5. Under Ext.P6 application, petitioners sought appointment of a Commissioner. It was contended that a rough plan is to be prepared after measuring the property. Secondly, it was contended that details of the drainage, its age and cost are to be ascertained. Learned Munsiff under Ext.P7 order found that in view of the contentions raised in the suit and the limited scope of the suit, it is not necessary to measure the property with reference to the survey records as sought for. Learned Munsiff also found that the reports submitted by Commissioner earlier show that the underground pipe cannot be located as ascertained by Commissioner at the time of the

inspection and therefore there is no necessity to appoint another Commissioner as sought for. Incidentally, learned Munsiff has also stated that the petition is belated and was an attempt to delay the disposal.

6. Eventhough on the ground of delay alone application should not be dismissed, the question is whether in exercise of the extraordinary jurisdiction of this Court under Article 227 of Constitution of India interference is called for in Ext.P7 order. Evenif, Ext.P7 order is erroneous on facts, it is not a reason to interfere in exercise of the supervisory or extraordinary jurisdiction of this Court under Article 227 of this Court.

7. The question whether Article 227 of Constitution of India could be invoked for interfering with the order passed under Order XXVI Rule 10 of Code of Civil Procedure or an order appointing the Commissioner or an order remitting the report or setting aside the report was considered by this Court in **A. Narayani Vs.**

Kittan @ Krishnan (1996(2)KLT 489. It was held that trial Court would be in a better position to look into these aspects and when the trial Court considered those matters and concluded that there is no necessity for issuing a second commission, this Court under Article 227 of Constitution of India cannot re-weigh the evidence. Learned Munsiff found that there are already two reports in the suit and the reports provide sufficient data to decide the disputes involved in the suit and it is not necessary to appoint another commissioner. There is no infirmity in that order warranting interference in exercise of the extraordinary jurisdiction of this Court under Article 227 of Constitution of India.

Petition is dismissed.

M.SASIDHARAN NAMBIAR,JUDGE

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